

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re: Application No. 09/661,171)

Confirmation No. 7502

Filed: September 13, 2000)

CERTIFICATE OF MAILING

Applicants: Christopher D. BARR et al.)

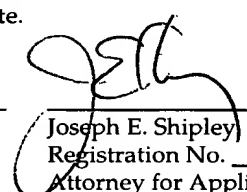
Title: END-LOAD CARTON
PACKAGING INCLUDING FOOD
DELIVERY SYSTEM)

I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to the Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on this date.

Art Unit: 1761)

Examiner: MADSEN, Robert A.)

8/2/2004
Date


Joseph E. Shipley
Registration No. 31,137
Attorney for Applicant(s)

Attorney Docket No.: 66688)

Customer No.: 22242)

Mail Stop APPEAL BRIEF - PATENTS
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

Sir:

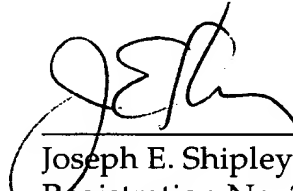
Applicants hereby submit to the Board of Patent Appeals and Interferences the following:

- ☐ A Notice of Appeal From The Primary Examiner To The Board Of Patent Appeals And Interferences is enclosed which includes the fee under 37 CFR § 1.117(b) for filing the Notice of Appeal.
- ☒ An Appeal Brief (in triplicate) is enclosed.
- ☐ Also enclosed:
- ☐ The fee for filing the Appeal Brief is \$ 330.00 (37 CFR § 1.17(c)).

Application No. 09/661,171
Appeal Brief Transmittal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

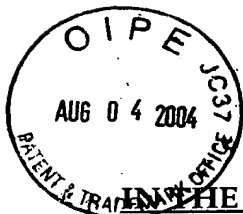
- ☐ Applicant(s) assert entitlement to Small Entity Status (37 CFR § 1.27), reducing the Appeal Fee by half to \$ 165.00.
- ☒ Charge \$ 330.00 to Deposit Account No. 06-1135.
- ☐ A check in the amount of the fee is enclosed.
- ☐ Not required (fee paid in prior appeal in this application).
- ☐ A petition for extension of time under 37 CFR § 1.136(a) is enclosed.
- ☒ The Director is hereby authorized to charge any additional fees which may be required in connection with this appeal (specifically including the fee for filing a brief in support of this appeal if such brief is filed unaccompanied by full payment therefor, and the fee for filing a request for an oral hearing if such request is made unaccompanied by full payment therefor), or credit any overpayment to Deposit Account No. 06-1135. Should no proper payment be enclosed herewith, the Director is authorized to charge the unpaid amount to Deposit Account No. 06-1135. This Notice is filed in duplicate.

August 2, 2004
Date



Joseph E. Shipley
Registration No. 31,137
Attorney or agent of record

FITCH, EVEN, TABIN & FLANNERY
120 South LaSalle Street, Suite 1600
Chicago, Illinois 60603-3406
Telephone: (312) 577-7000
Facsimile: (312) 577-7007



AK IRW

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

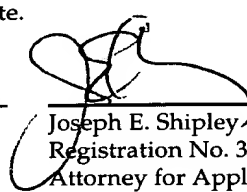
In re: Application No. 09/661,171)
Filed: September 13, 2000)
Applicants: Christopher D. BARR et al.)
Title: END-LOAD CARTON)
PACKAGING INCLUDING FOOD)
DELIVERY SYSTEM)
Art Unit: 1761)
Examiner: MADSEN, Robert A.)
Attorney Docket No.: 66688)
Customer No.: 22242)

Confirmation No. 7502

CERTIFICATE OF MAILING

I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to the Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on this date.

8/2/2004
Date


Joseph E. Shipley
Registration No. 31,137
Attorney for Applicant(s)

Mail Stop APPEAL BRIEF - PATENTS
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

APPELLANTS' BRIEF ON APPEAL UNDER 37 C.F.R. § 1.192

Sir:

This Appeal Brief is filed pursuant to the "Notice of Appeal From the Primary Examiner to the Board of Patent Appeals and Interferences" mailed on April 1, 2004 and a notice under 37 C.F.R. § 1.192(c)(6).

I. REAL PARTY IN INTEREST

Kraft Foods Holdings, Inc. is the assignee of the above-named patent application.

08/05/2004 YPOLITE1 00000021 061135 09661171
01 FC:1402 330.00 DA

In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

II. RELATED APPEALS AND INTERFERENCES

None.

III. STATUS OF CLAIMS

Appellants appeal the final rejection of claims 19-30 that are pending as of the filing date of this Brief. Claims 1-18 are cancelled. Appendix A presents the amended claims at issue in the appeal.

IV. STATUS OF AMENDMENTS

In response to Appellants' Amendment C, which was mailed on September 8, 2003, the Examiner issued a final rejection on January 2, 2004. The Examiner rejected all pending claims 19-30 for being unpatentable pursuant to 35 U.S.C. § 103(a). No amendments after the final rejection have been submitted or entered by the examiner.

V. SUMMARY OF INVENTION

The invention provides a method to form and fill a packaging system that includes a container comprising a plurality of individual, single-serve, hand-held food items that provide protection for the food items during packaging, shipping, handling, retail display, and consumer use. (Spec., Page 2, Lines 1-5.) The packaging system also preferably includes elongated trays to support the food item within an overwrap. (Spec., Page 2, Lines 9-10.) The trays are packaged in the container so that they are readily accessible to the consumer and allow an individual to consume the food item without direct manual contact with the food. (Spec., Page 2, Lines 6-7.)

More specifically, the claimed method is directed, in part, to providing a plurality of food delivery systems 30 that each comprise a food product 46, an

elongated food delivery tray 32 that contains and protects the food product 46, and a flexible sheet wrap 34 overlying the delivery system. (Spec., Page 2, Lines 9-10.) The food delivery tray 32 preferably has sufficient strength and stiffness to withstand compression loads experienced during packaging, shipping, handling, retail display and consumer use, but also includes at least one predetermined area of weakness to facilitate controlled incremental bending of the tray to improve accessibility to the food item during consumption. (Spec., Page 2, Lines 10-14.)

As generally shown by FIGS. 4 and 5 of the application, which are reproduced below, the elongated tray 32 comprises a bottom wall 36, a pair of side walls 38, and a pair of end walls 40 to withstand compression on all sides. (Spec., Page 6, Lines 5-13.) The tray includes weakening features formed in its sidewall that do not compromise the strength and stiffness of the side wall to withstand compression loads because the features do not extend the entire height of the sidewalls. (Spec., Page 2, Lines 10-14.) Preferably the weakening features include at least one notch 48 and one or more curved recesses 54 in the same sidewall together with a line of weakness 50 extending from the bottom of each notch to the bottom wall. (Spec., Page 2, Line 24 through Page 3, Line 4.)

Fig. 5

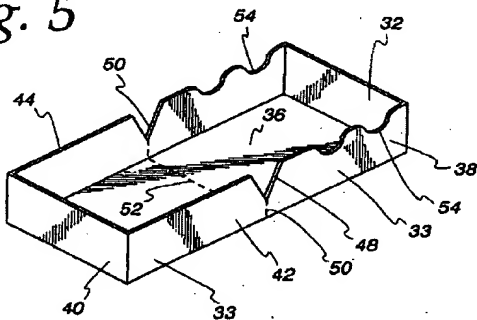
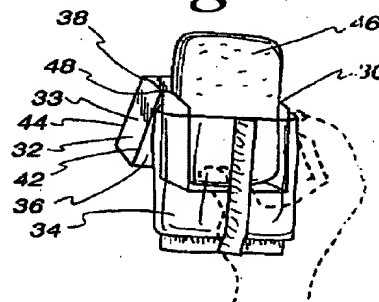


Fig. 4



The notches 48 and lines of weakness 50 enable the sidewalls to be divided or split at predetermined locations by bending of the tray. (Spec., Page 2, Lines

The step of inserting the food delivery systems 30 comprises arranging the food products and associated delivery systems in two rows, one stacked atop the other, adjacent the open bottom of the carton and then pushing the rows into the partially formed carton by the mandrel. (Spec., Page 3, Lines 18-24.) When loading through the bottom as shown in FIG. 27, the mandrel acts directly on each food delivery system 30, which preferably reduces compression loads on the individual delivery system. (Spec., Page 3, Lines 20-24.)

Applicants' claimed method therefore comprises the combination of:

- an elongated tray having multiple weakening features in the same sidewall that do not affect the strength or stiffness of the tray to withstand compression loads (Spec., Page 2, Line 10-14.);
- the elongated tray having at least one notch spaced from one or more curved recesses on the same sidewall (Spec., Page 2, Line 24 through Page 3, Line 4.);
- the step of simultaneously inserting a plurality of wrapped food products into a container (Spec., Page 3, Lines 18-20.); and
- the wrapped food products being arranged within a container so that an end seal is readily accessible without restriction from the top of the container when the container is opened (Spec., Page 4, Lines 1-3).

In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

VI. ISSUES

1. Are claims 19-23 obvious over a combination of 12 references: Latif (US 5,161,733) in view of Brizzi et al. (US 5,277,304) and Barnard (US 4,081,126) and Beckmann (US 5,341,626) and Ringler (US 2,874,524) and Williamson (US 3,073,501) and Munson (US 422,032) and Wasserman (US 3,009,621) and Moore (US 2,936,944) and Krzyanowski (US 3,367,552) and Frost (US 5,181,649) and Taylor (2,011,383).

2. Is claim 24 obvious over a combination of 13 references: Latif in view of Brizzi et al. and Barnard and Beckmann and Ringler and Williamson and Munson and Wasserman and Moore and Krzyanowski and Frost and Taylor and further in view of Pierce, Jr. (US 3,400,877).

3. Are claims 25-26 obvious over a combination of 14 references: Latif in view of Brizzi et al. and Barnard and Beckmann and Ringler and Williamson and Munson and Wasserman and Moore and Krzyanowski and Frost and Taylor and further in view of Pierce, Jr. and further in view of Kingham (US 4,721,622).

4. Are claims 27-30 obvious over a combination of 15 references: Latif in view of Brizzi et al. and Barnard and Beckmann and Ringler and Williamson and Munson and Wasserman and Moore and Krzyanowski and Frost and Taylor and further in view of Pierce, Jr. and further in view of Kingham and further in view of Phillips, Jr. (US 4,738,359).

In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

VII. GROUPINGS OF CLAIMS

For the Section 103(a) rejections:

- Group I: Claim 19 and depending claims 20-23.
- Group II: Dependent claim 24.
- Group III: Dependent claims 25-26.
- Group IV: Dependent claims 27-30.

Group I does not limit the formation of the elongated food delivery tray. Group II provides limitations on the formation of the tray. Group III requires a specific food product. Group IV limits the size of the tray and container to specific dimensions particular to the food product used and packaging requirements.

VIII. ARGUMENT

THE INVENTION IS NOT OBVIOUS IN VIEW OF THE CITED REFERENCES BECAUSE THE EXAMINER HAS FAILED TO ESTABLISH A *PRIMA FACIE* CASE OF OBVIOUSNESS

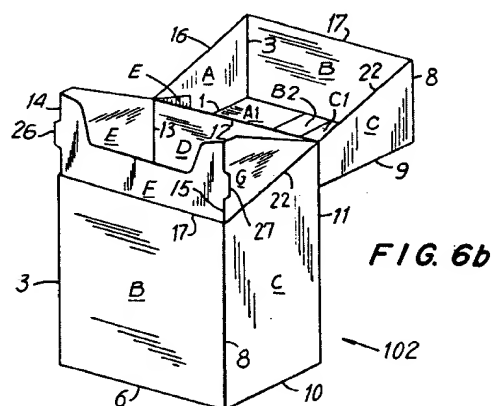
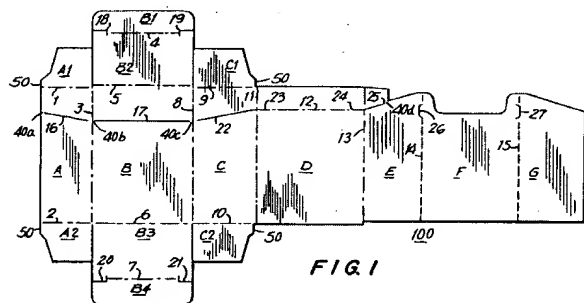
Against this background, all of the claims have been rejected as obvious by a large number of disparate references. There is no motivation to combine so many references, which, if combined, teach away from the invention and do not even suggest all the claimed limitations. The examiner has combined references disclosing tobacco products to teach a method that comprises, in part, the packaging of a food item having a tray with weakening features in a tray sidewall to facilitate the consumption of the food item while still in the tray.

The references will be described below, but Applicants respectfully submit these references should not be combined. But even if they are combined, they do not render the claims obvious.

A. Cited References

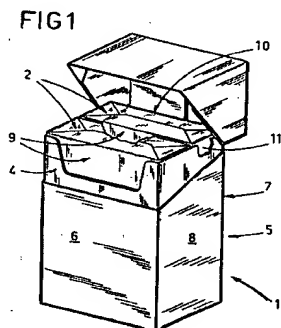
1. Latif (U.S. Patent No. 5,161,733)

Latif discloses a hinge lid cigarette carton that has an inner frame, such as carton 102 shown below in a reproduction of FIG. 6b. Latif also discloses a method of forming such carton from a blank. FIG. 1, also reproduced below, illustrates the blank material from which the cartoon is formed.



2. Brizzi et al. [Brizzi] (U.S. Patent No. 5,277,304)

Brizzi discloses a packet of cigarettes capable of accommodating at least two groups of cigarettes enveloped in respective wrappers surrounded by at least one internal collar. FIG. 1, reproduced below, illustrates package 1 holding two groups of cigarettes 2.



3. Beckmann (U.S. Patent No. 5,341,626)

Beckmann discloses a cartoning method for the packaging of articles grouped to form generally cuboid shaped package contents of variable dimensions. The method comprises the erection of carton blanks to form open-ended tubular receivers and the insertion of the grouped articles into such erected cartons. FIG. 1, reproduced below, illustrates a cartoning apparatus.

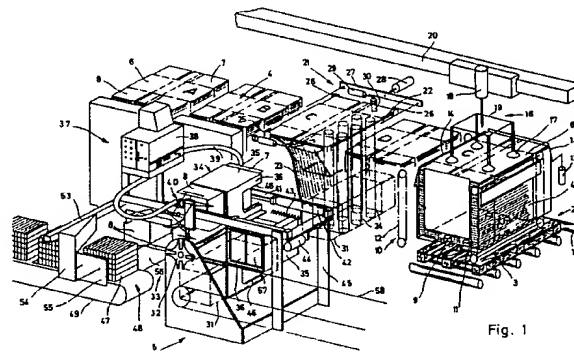


Fig. 1

4. Ringler (U.S. Patent No. 2,874,524)

Ringler discloses a cigarette package 10 and a method of production using a standard cigarette-packing machine from a blank 15. FIGS. 2-3, reproduced below, illustrate the cigarette package 10 and the blank from which the cigarette package is formed.

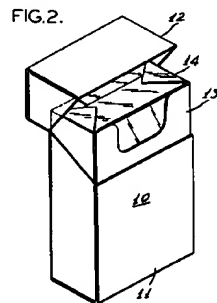


FIG.2.

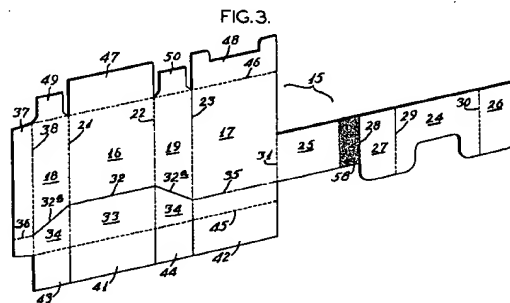
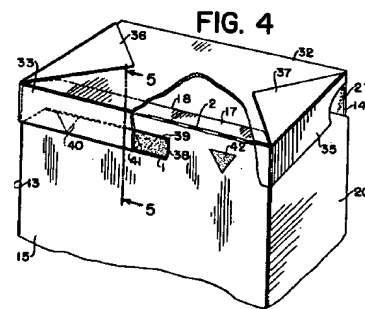
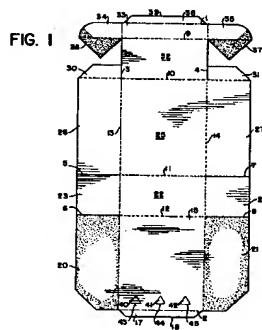


FIG.3.

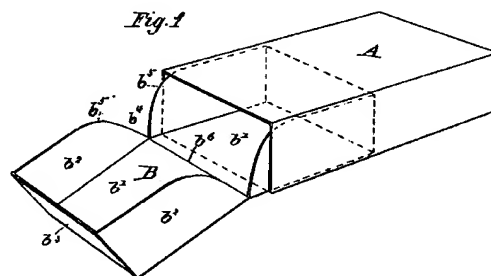
5. Williamson (U.S. Patent No. 3,073,501)

Williamson discloses a carton formed of paper board having a reclosable cover hinged to a box part and adapted to telescope over the open end of the box part. The carton has a sealed reclosable cover with releasable locking means such as the type widely known as the "KLIKTOP." Williamson also discloses a process to form such carton. FIGS. 1 and 4, reproduced below, illustrate the paper board blank and a formed carton.



6. Munson (U.S. Patent No. 422,032)

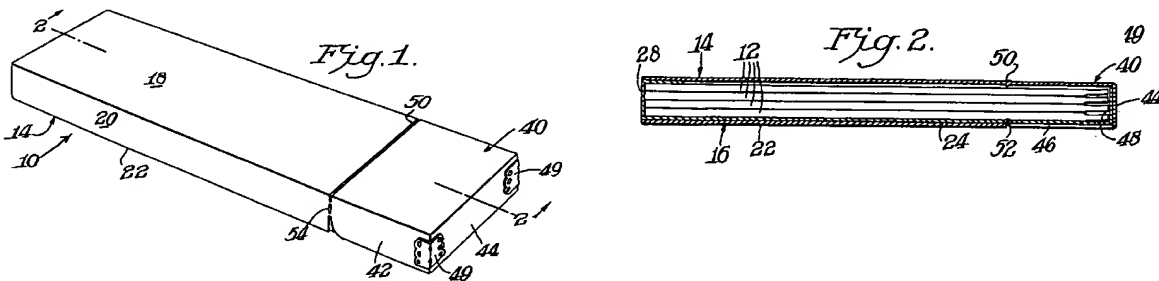
Munson discloses a slide paper box, shown in FIG. 1 and reproduced below, comprising a cover A and a slide B having a cut b⁴. The paper box is particularly designed for use in packing cigarettes.



In re Application No. 09/661,171
 Appellants' Brief on Appeal dated August 2, 2004
 Decision of Primary Examiner dated January 2, 2004

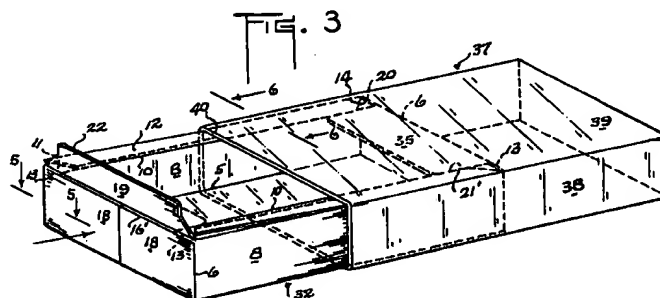
7. Wasserman (U.S. Patent No. 3,009,621)

Wasserman discloses a single carton for welding rods as shown in FIGS. 1 and 2, which are reproduced below. The carton of Wasserman comprises yieldable seams 50 and 52 and perforated seams 54 to form a lid-shaped extension 44.



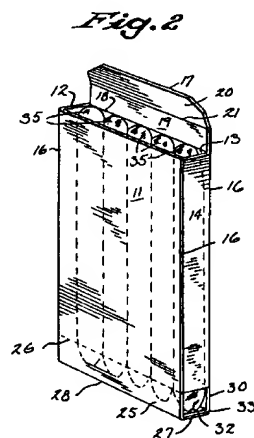
8. Moore (U.S. Patent No. 2,936,944)

Moore discloses a single telescopic self-sealing container as shown in FIG. 3, which is reproduced below. The container of Moore comprises component 32 inserted into tubular, rectangular-shaped sleeve component 37.



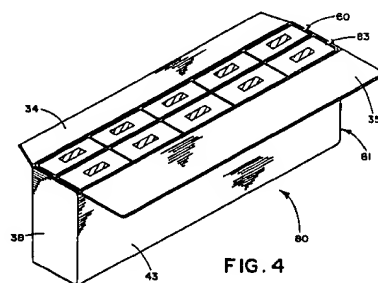
9. Krzyanowski (U.S. Patent No. 3,367,552)

Krzyanowski discloses a single dispenser carton with a swingable bottom as shown in FIG. 2, which is reproduced below. The tubular carton of Krzyanowski preferably contains cigars and comprises four principal side panels and a closure flap at each end. The bottom construction can be swung relative to the body of the carton.



10. Phillips, Jr. [Phillips] (U.S. Patent No. 4,738,359)

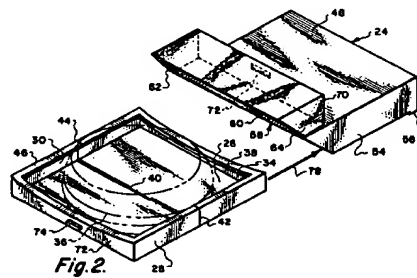
Phillips discloses a master carton 80 for containing ten packages of cigarettes. As shown in FIG. 5, reproduced below, Phillips teaches that two half-cigarette cartons 60 and 83, which each hold five cigarettes packages, may be combined together in carton 80.



In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

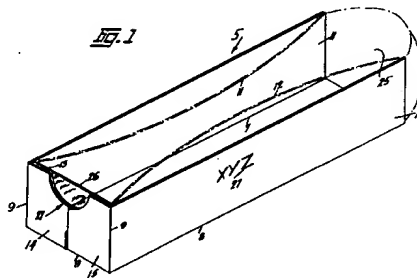
11. Frost (U.S. Patent 5,181,649)

Frost discloses a single sandwich serving container that includes a tray 22, upon which a food product is located, and a lid 24. As shown in FIG. 2, the tray 22 comprises a score or bend line 40 connected to slits 42 and 44.



12. Taylor (U.S. Patent No. 2,011,383)

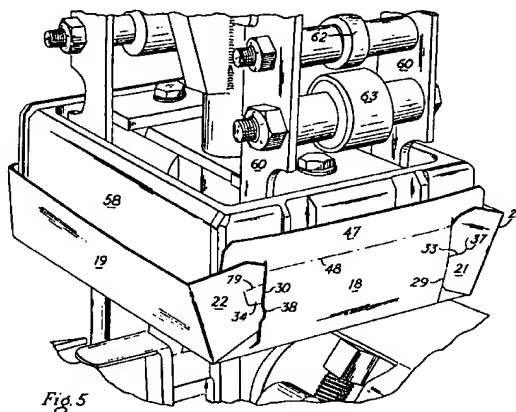
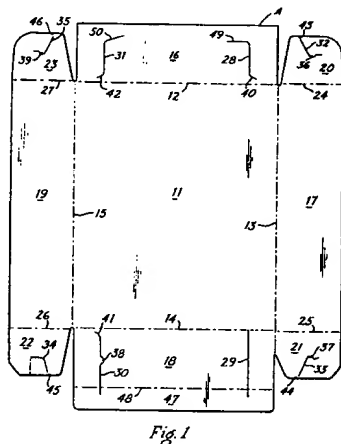
Taylor discloses a single container 5 for frankfurters and other food articles as shown in FIG. 1 reproduced below. Container 5 includes a single finger opening 21 in end wall sections 13, 14, and 15.



In re Application No. 09/661,171
 Appellants' Brief on Appeal dated August 2, 2004
 Decision of Primary Examiner dated January 2, 2004

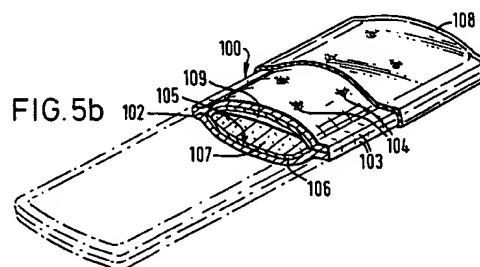
13. Pierce, Jr. (U.S. Patent No. 3,400,877)

Pierce, Jr. discloses glueless panel locks such as corner locks for folding boxes. The box of Pierce, Jr. is formed from a blank A that includes flaps 21 and 22 that can be inserted into insertion slots 29 and 30 as shown in FIGS. 1 and 5, which are reproduced below.



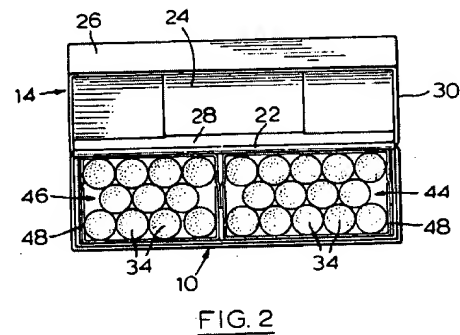
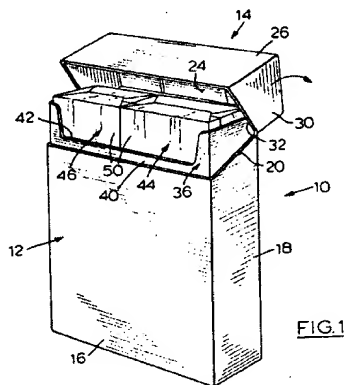
14. Kingham et al. [Kingham] (U.S. Patent No. 4,721,622)

Kingham discloses shelf stable, filled food and a method of producing the food items. As shown in FIG. 5b, Kingham teaches a single snack food product comprising a filing 107 enclosed in a bread-like casing 100 enclosed by a moisture-proof wrap 108. Kingham packages the food item in wrap 108 rather than a tray. Wrap 108 is a foil laminated with a plastics material.



15. Barnard (U.S. Patent No. 4,081,126)

Barnard discloses a dual-bundle cigarette packaging structure comprising a hard-box, hinge-lid package of twenty-five cigarettes that separates the cigarettes into two distinct bundles, each of which is laterally confined by foil paper.



B. Examiner's art rejections

The Examiner rejected claims 19-23 from claim Group I under 35 U.S.C. § 103(a) as being unpatentable over Latif in view of Brizzi et al. and Barnard and Beckmann and Ringler and Williamson and Munson and Wasserman and Moore and Krzyanowski and Frost and Taylor.

The Examiner next rejected claim 24 from claim Group II under 35 U.S.C. § 103(a) as being unpatentable over Latif in view of Brizzi et al. and Barnard and Beckmann and Ringler and Williamson and Munson and Wasserman and Moore and Krzyanowski and Frost and Taylor and further in view of Pierce, Jr.

The Examiner further rejected claims 25-26 from claim Group III under 35 U.S.C. § 103(a) as being unpatentable over Latif in view of Brizzi et al. and Barnard and Beckmann and Ringler and Williamson and Munson and Wasserman and Moore and Krzyanowski and Frost and Taylor and further in view of Pierce, Jr. and further in view of Kingham.

In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

Lastly, the Examiner rejected claims 27-30 from claim Group IV under 35 U.S.C. § 103(a) as being unpatentable over Latif in view of Brizzi et al. and Barnard and Beckmann and Ringler and Williamson and Munson and Wasserman and Moore and Krzyanowski and Frost and Taylor and further in view of Pierce, Jr. and further in view of Kingham and further in view of Phillips, Jr..

C. The law of Obviousness

The Patent Office has the burden to establish a *prima facie* case of obviousness. *In re Thrift*, 298 F.3d 1357, 1363 (Fed. Cir. 2002); MANUAL OF PATENT EXAMINING PROCEDURE § 2143 (Eighth Edition, Rev. dated May 2004) [hereinafter MPEP]. An invention is *prima facie* obvious over the prior art if three criteria are satisfied. MPEP § 2143. The references must provide a suggestion or motivation to be combined in order to arrive at the claimed invention. *In re Sang-Su Lee*, 277 F.3d 1338, 1343 (Fed. Cir. 2002); MPEP § 2143.01. Second, there must be a reasonable expectation of success. *Noelle v. Lederman*, 355 F.3d 1343, 1351-52 (Fed. Cir. 2004); MPEP § 2143.02. Third, the references must teach or suggest all the claim limitations. MPEP § 2143.03. *See Thrift*, 298 F.3d at 1363.

When establishing the *prima facie* case, it is impermissible to use the claimed invention as a blueprint or instruction manual to piece together the teachings of the prior art so that the claimed invention is obvious. *In re Rouffet*, 149, F.3d 1350, 1357 (Fed. Cir. 1998); *In re Gorman*, 933 F.2d 982, 987 (Fed. Cir. 1991). Moreover, the mere fact that references can be combined or modified is not sufficient to establish obviousness. *In re Mills*, 916 F.2d 680, 682 (Fed. Cir. 1990); MPEP § 2143.01. In fact, in order to rely on a reference for the basis of an obviousness rejection, the reference must either be in the applicant's field of endeavor or reasonably pertinent to the particular problem with which the invention is addressing. *In re Oetiker*, 977 F.2d 1443, 1446 (Fed. Cir. 1992); MPEP § 2141.01(a).

The Examiner has pieced together several references based on Applicants' disclosure without a sufficient suggestion or motivation to combine so many references from different technologies. Hence, the Examiner has failed to establish a *prima facie* claim of obviousness. As a result, Applicants do not have to produce evidence of non-obviousness. MPEP § 2142. The following discussion highlights the failure of the examiner's obviousness rejections.

D. Claim Group I (independent claim 19 and dependent claims 20-23) is not obvious over the cited references because there is no suggestion to combine or modify the references to teach a packaging method having a plurality of wrapped food trays in a container with an end seal readily accessible to a consumer and multiple potentially weakening features on the same sidewall.

1. The Examiner has pieced together several references without a motivation to combine non-analogous arts by using the claimed invention as an instruction manual.

Claim 19 is a method to form and fill a container that provides a packaging system for a food product that provides the consumer with:

- a packaged food product in a food delivery tray system, which comprises weakening features, that facilitate handling;
- a food delivery tray system that includes an elongated tray having sufficient strength and stiffness, even with the weakening features, to withstand compression loads experienced during packaging; and
- a container having a plurality of packaged food products arranged such that each of the wrapped food products will have an end seal readily accessible without restriction from the top of the container when the container is opened.

In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

For the obviousness rejection of claim group I, the examiner has cited Latif, Brizzi, Barnard, Beckmann, Ringler, Williamson, Munson, Wasserman, Moore, Krzyanowski, Frost, and Taylor. As will be discussed below, there is no motivation or suggestion to combine so many disparate references that relate to so many different arts that are also not pertinent to or teach away from the problems solved by the Applicants' claimed invention.

To begin with, the majority of the references are not from Applicants' field of endeavor in food processing and are also not pertinent to the problems addressed by Applicants' claimed invention. Of the twelve references pieced together for the obviousness rejection of claim group I, the majority of references do not relate to food processing. Only two references are related to food (Frost and Taylor) and only two references are related to containers in general (Moore and Williamson). Surprisingly, the bulk of references picked by the Examiner relate to arts remote from food processing. Wasserman pertains to a reinforced carton for welding rods, and the majority of the references, including the primary reference, relate to tobacco products.

Seven references are directed to tobacco products (Beckmann, Krzyanowski, Barnard, Munson, Ringler, Brizzi, Latif). Beckmann primarily teaches a cartoning method and apparatus that is particularly well suited for use in the packaging of cigarettes. (Col. 1, Lines 23-25.) Krzyanowski teaches a dispenser carton primarily designed for cigars. (Col 3, Lines 23-24.) Barnard teaches a dual-bundle cigarette packaging structure. (Col 1, Lines 6-7.) Munson teaches a slide-paper box particularly designed for use in packing cigarettes. (Col. 1, Lines 8-10.) Ringler teaches a new and useful improvement in cigarette packages. (Col. 1, Lines 15-16.) Brizzi teaches a packet of cigarettes. (Col 1, Lines 5-6.) Latif teaches a method of forming a hinge-lid cigarette carton. (Col. 1, Lines 7-8.)

The tobacco and welding rod references are also not pertinent to the problems confronted by the Applicants. For instance, such references are not concerned with providing a tray having features to facilitate handling of the tray or the shielding of the product from compression loads. Users of cigarettes or cigars are not interested in the ability to handle a package in order to use such tobacco products while still in the package. Moreover, the cigarette or cigar itself can provide resistance to compression during packaging. Consequently, these references would not be modified or combined without the hindsight of Applicants' specification as a road map to piece the references together.

In addition to not being pertinent, the references directed to tobacco products and welding rods would also not be combined because they teach away from applicant's claimed method. The seven references directed to tobacco products disclose cartons and packs designed to hold cigarettes or cigars, which, as is commonly known, are to be removed from the pack prior to use. Likewise, Wassermen teaches a carton for holding welding rods, which are also to be removed from the carton prior to use. Applicants' invention is to a method that provides, in part, a tray that includes weakening features. Such features facilitate the consumption of the packaged food item while still in the tray.

Packages to hold tobacco products are not designed to facilitate the use of a cigarette or cigar while still in the package. All cigarettes and cigars are removed from their respective packages and held by an individual during use; directly opposite the claimed invention. It would be absurd to modify a cigarette package to allow the smoking of a cigarette while still in the package. Similarly, welding rods are also removed from the package because use of the welding rod while still in the package would be difficult for the user. Consequently, none of the references relating to tobacco products or welding rods would be combined with references relating to food products because the tobacco references teach away from the

In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

claimed invention because all such references cited by the Examiner all suggest packages designed for removal of its product for consumer use.

As a result, there is no motivation to combine the references teaching tobacco products with a reference relating to welding rods to arrive at the claimed invention in claim group I.

2. The cited references do not teach or suggest a method of forming and filling a container that includes a plurality of wrapped food products comprising an elongated delivery tray system having multiple potentially weakening features on the same sidewall.

Even if the twelve references are combined, which they can not be as discussed previously, they do not teach all the limitations of claim group I. Claim 19 requires, among other limitations, that the elongated food tray

- comprise sufficient strength and stiffness to withstand compression loads experienced during packaging;
- shield the elongated food product from compression loads; and
- have at least one notch extending from an upper edge of the side wall and one or more curved recesses in the upper edge of the same sidewall.

Of the twelve references combined for the obviousness rejection, the Examiner picks the combination of Munson, Wasserman, and Taylor to suggest the notch and curved recess in the same side wall as recited in claim 19.

If combined, Applicants respectfully submit that the combination of these three references do not teach or even remotely suggest such structure of the tray as recited in claim 19. Munson and Wasserman do not teach the use of a curved recess together with a notch on the same side wall. The addition of Taylor does not solve

this deficiency. Taylor teaches the use of a finger opening on the end wall and does not teach the use of two such features on the same wall. Additionally, Taylor suggests the use of a multi-layered construction and the finger opening in the end wall; consequently, Taylor's finger opening, formed at the end of the elongated container does not carry the compressive load as called for in claim 19.

Consequently, claim group I is not obvious over the cited references because even if Munson, Wasserman, and Taylor were combined, which they can not, these references in combination with the other references do not teach or suggest a method that provides an elongated tray comprising both a notch *and* a curved recess in the same *side wall*. Furthermore, Munson, Wasserman, and Taylor in combination with the other references do not teach a tray having multiple weakening features that is also able to withstand compression loads experienced during packaging.

3. The cited references do not teach or suggest a method of forming and filling a container that presents the consumer with immediate access to an end seal of a plurality of a wrapped food products in combination with the other limitations.

Claim group I, specifically claim 19, further requires that the wrapped food products "will have an end seal readily accessible without restriction from the top of the container when the container is opened." Of the twelve cited references for the obviousness rejection, the Examiner picks Barnard, which discloses a dual bundle cigarette packaging structure, to teach or suggest this limitation. The Examiner states that "Barnard teaches [that] wrapped elongated products similar to Latif and Brizzi et al. (i.e. cigarette packs) should be arranged with the end seal adjacent to the top of the container or carton because all of the wrapped elongated products are visible and accessible."

Applicants' invention in claim group I provides a food product with an elongated flexible sheet wrap; however, the flexible sheet wrap is not capable of providing strength to withstand the compression loads experienced during packaging. To solve this problem, claim 19 includes the tray to shield the food product from compression strength during packaging along with the flexible wrap. To aid in the removal of the tray, it is further required in claim 19 that each wrapped food product have an end seal that is readily accessible without restriction from the top of the container when the container is opened. The consumer, as a result, is provided with immediate access to an end seal of the elongated flexible sheet wrap to withdraw the wrapped food product using the end seal as a handle for grasping. The end seal/handle allows the withdrawing of the wrapped food product despite resistance to withdrawal caused by contact with neighboring wrapped food products, which are present in a tightly fitting configuration within the container.

Barnard, the reference picked by the Examiner to suggest this limitation, teaches the use of a foil paper around a bundle of cigarettes without the use of a tray; therefore, the bundle of Barnard does not protect the cigarettes from compressive forces. Moreover, the fact that all the cigarettes are visible and accessible as stated by the Examiner does not suggest an end seal that is readily accessible without restriction from the top of the container when the container is opened as required by claim 19.

Consequently, even if Barnard could be combined with the eleven other references, which it can not, Claim group I is not obvious over the cited references because Benard combined with the other references does not teach a container having a plurality of wrapped food products in a tray having the end seal of an elongated food wrap readily accessible to a consumer upon opening of the container.

In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

- E. Claim Group II (dependent claim 24) is not obvious over the cited references because there is no suggestion to modify the references to teach a method using a tray formed without adhesive and without manual assembly in combination with all the other claim limitations.**

Claim group II, or dependent claim 24, includes all the limitations of claim group I discussed above; therefore, claim 24 includes all the limitations of claims 19-23. Dependent claim 24 specifically requires that the "tray is formed from a flat blank and the corners are locked together without requiring adhesive and without requiring manual assembly" *in addition* to all the other limitations from claims 19-23 from which claim 24 depends. The previous discussion from claim group I, as a result, is incorporated herein by reference.

The Examiner cites a thirteenth reference, Pierce, Jr., as teaching a tray that is formed by locking the corners together without requiring adhesive or manual assembly. Adding this additional reference does not overcome the deficiencies of the prior twelve references to teach all the limitations of claims 19-23 upon which claim 24 depends.

As with the previous references, there is no motivation to add another reference to the combination already cited. Furthermore, even if combined, Pierce, Jr. does not teach or suggest the claim limitations missing from the other references such as a tray having a notch and curved recess in the same sidewall, a tray sidewall having multiple weakening features yet strong enough to withstand compression forces, or the packaging of a plurality of wrapped food products having an end seal readily accessible to the consumer *in combination with* a tray that has locked corners completed without adhesive or manual assembly.

Consequently, claim group II is not obvious over the combination of thirteen references because there is no motivation to combine yet another reference, and,

In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

even if combined, the combination does not teach all the limitations of the claims upon which claim group II depends.

- F. Claim Group III (dependent claim 25-26) is not obvious over the cited references because there is no suggestion to modify the references to teach a method with a food product having a cream cheese component disposed within a farinaceous component in combination with all the other claim limitations.**

Claim group III, which includes dependent claims 25-26, includes all the limitations of claim group I and all the limitations of claim group II discussed above. Claim 25 includes all the limitations of claims 19-24, and claim 26 includes all the limitations of claims 19-25. Dependent claim 25 specifically requires that the "the food product comprises a cream cheese component disposed within a larger farinaceous component or sandwiched between a pair of farinaceous components" *in addition* to all the other limitations from claims 19-24 from which claim 25 depends. Likewise, claim 26 adds the requirement that the "farinaceous component comprises a baked bread product or a bagel product" *in addition* to all the other limitations from claims 19-25. As a result, the previous discussions from claim group I and claim group II are incorporated herein by reference.

The Examiner cites a fourteenth reference, Kingham, to teach a food product comprising a cream cheese component disposed between a larger farinaceous component or sandwiched between a pair of farinaceous components in addition to all the limitations upon which claims 25 and 26 depend. Unfortunately, Kingham would not be combined with the other thirteen references to arrive at the claimed inventions and, even if combined, does not overcome the deficiencies of the other references.

In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

1. There is no motivation to combine Kingham with the other references because Kingham contains no reference to placing a food product in a tray for consumption without handling the food product.

Kingham discloses a snack food product 100 comprising a filling 107 wholly enclosed in a bread-like casing 100 wrapped in a sterile moisture-proof wrap 108. There is no suggestion in Kingham pertaining to a method that provides a food product within a tray for protection and consumption without removing the item from the tray. As a result, Kingham is also not pertinent to and teaches away the problems solved by claim group I.

Kingham discloses food products that are wrapped in a "foil laminated with a plastics material such as a polyamide (e.g. 'Nylon') or polyethylene which is then capable of being subject to a sterilization operation by heat treatment." (See Col. 7, Lines 64-69.) Kingham suggests food packaging suitable for sterilization. Kingham does not suggest food packaging for the protection of the food item or a tray having weakening features. Additionally, because Kingham only uses an outer wrap 108 without a tray, Kingham actually teaches away from Applicants' claimed invention because the food product of Kingham can not withstand compression forces.

Consequently, because Kingham includes no reference to an inner tray, there is no motivation to combine it with the thirteen references cited, because one skilled in the art would not have looked to Kingham to solve the problems discussed previously.

2. The combination of Kingham with the thirteen previously cited references does not teach or suggest all the claimed limitations.

As discussed above, dependent claims 25 and 26 of claim group III include all the limitations of the proceeding claims. Claim group III recites patentable

In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

subject matter because the cited references do not teach or suggest all the limitations upon which claims 25 and 26 depend. The addition of Kingham, however, does not overcome the deficiencies of the other references.

As previously discussed, there is no motivation to add Kingham to the combination already cited. However, even if combined, Kingham does not teach or suggest the claim limitations missing from the other references such as a tray having a notch and curved recess in the same sidewall, a tray sidewall having multiple weakening features yet strong enough to withstand compression forces, or the packaging of a plurality of wrapped food products having an end seal readily accessible to the consumer *in combination with* a food product having the specific limitations of a cream cheese and farinaceous component.

Consequently, claim group III is not obvious over the combination of fourteen references because there is no motivation to combine yet another reference, and, even if combined, the combination does not teach all the limitations of the claims upon which claim group III depends.

F. Claim Group IV (dependent claim 27-30) is not obvious over the cited references because there is no suggestion to modify the references to teach a container and food delivery system having specific dimensional limitations in combination with all the other claim limitations.

Claim group IV, which includes dependent claims 27-30, includes all the limitation of claim group I, all the limitations of claim group II, and all the limitations of claim group III discussed above. Claims 27 through 30 add specific dimensional limitations *in addition* to all the other limitations from claims 19-26. As a result, the previous discussion for claim groups I, II, and III is incorporated herein by reference.

In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

The Examiner cites a fifteenth reference, Phillips, Jr., which discloses sizes for a "conventional cigarette pack, carton, and paperboard dimensions." As previously discussed there is no motivation to combine yet another reference directed to tobacco products with the other fourteen references already cited to arrive at the claimed invention. Phillips, Jr. is also not analogous art and not pertinent to the problems addressed by the Applicants' invention for reasons already discussed.

Also, similar to the prior discussions, Phillips, Jr. does not overcome the deficiencies of the other combined references to teach all the limitations of claim group IV. For instance, even if combined, Phillips, Jr. does not teach or suggest the claim limitations missing from the other references such as a tray having a notch and curved recess in the same sidewall, a tray sidewall having multiple weakening features yet strong enough to withstand compression forces, or the packaging of a plurality of wrapped food products having an end seal readily accessible to the consumer *in combination with* the specific dimensional limitations of the tray or container.

Consequently, claim group IV is not obvious over the combination of fifteen references because there is no motivation to combine yet another reference, and, even if combined, the combination does not teach all the limitations of the claims upon which claim group IV depends.

IX. APPENDIX

Listing of Claims

19. (Previously Presented) A method of forming and filling in an automated filling operation a container suitable for shipping, display and consumer use having a body and a cover from an open-ended, partially pre-glued, partially assembled container comprising top, top front, top side, bottom front, bottom back, and bottom side flaps, comprising:

- (a) folding the top side flaps inward;
- (b) thereafter folding the top and top front so that the top front overlaps in part the front of the container, and attaching the top front to the front of the package to provide a closed top and an open bottom for the container;
- (c) providing a plurality of wrapped food products, having opposed ends, each wrapped food product comprising an elongated food product, an elongated food delivery tray system, and an elongated flexible sheet wrap overlying the elongated food delivery tray system having end seals at opposite ends thereof to seal the elongated food product, each elongated food delivery tray system comprising an elongated tray that has sufficient strength and stiffness to withstand compression loads experienced during packaging and to shield the elongated food product from the compression loads, said, including a bottom wall, a pair of side walls joined to the bottom wall, and a pair of end walls adjacent the wrapped food product ends and joined to the bottom wall, each of said side walls having at least one notch extending from an upper edge of the side wall, along a portion of the height of each side wall and a line of weakness extending from the bottom of each notch to the bottom wall, and one or more curved recesses in the upper edges of the side walls and spaced from the at least one notch to facilitate handling;

(d) inserting said plurality of wrapped food products simultaneously through the open bottom by applying compressive force to one of the end walls of all of said wrapped food products simultaneously with a mandrel, so as to transmit the compressive force along said sidewalls to the other of the end walls, in a direction extending along the longitudinal axis of the elongated food product thereby urging said wrapped food products longitudinally into the container, with said wrapped food products being arranged so that said mandrel acts directly on each of the end walls of the delivery tray systems and each of said wrapped food products will have an end seal readily accessible without restriction from the top of the container when the container is opened;

- (e) folding the bottom side flaps inward;
- (f) folding either the bottom front or the bottom back flap inward,
- (g) folding the remaining bottom flap inward, and
- (h) fastening the flap folded in step (g) to the flap folded in step (f).

20. (Previously Presented) The method of claim 19 wherein attaching the top front to the front of the package comprises releasable attachment by adhesive.

21. (Previously Presented) The method of claim 20 further comprising providing a line of weakness joining the top to the body of the container to facilitate removal of the top from the container.

22. (Previously Presented) The method of claim 21 wherein the recesses are provided by die-cutting the upper regions of the side walls.

In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

23. (Previously Presented) The method of claim 22 wherein each of the notches in the sidewalls comprises a notch extending between about 1/4 and about 3/4 of the distance from the top edge of the side wall to the bottom edge of the side wall.

24. (Previously Presented) The method of claim 23 wherein said tray is formed from a flat blank and the corners are locked together without requiring adhesive, and without requiring manual assembly.

25. (Previously Presented) The method of claim 24 wherein the food product comprises a cream cheese component disposed within a larger farinaceous component or sandwiched between a pair of farinaceous components.

26. (Previously Presented) The method of claim 25 wherein each farinaceous component comprises a baked bread product or a bagel product.

27. (Previously Presented) The method of claim 26 wherein the length of the tray is between about 3.5 in. and about 5.5 in., and the width of the tray is between 1 in. and about 3 in., and the depth of the tray is between about 0.5 in. and about 1.5 in.

28. (Previously Presented) The method of claim 27 wherein the tray and container are made of paperboard having a thickness of about 0.01 to 0.025 in.

29. (Previously Presented) The method of claim 26 wherein the tray and container are made from paperboard having a thickness of about 0.015 to about 0.022 in.

In re Application No. 09/661,171
Appellants' Brief on Appeal dated August 2, 2004
Decision of Primary Examiner dated January 2, 2004

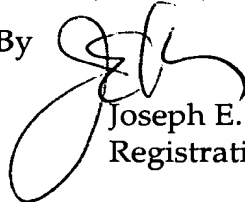
30. (Previously Presented) The method of claim 26 wherein the height of the carton is between about 4.5 in. and about 6.5 in., the width of the carton is between about 8 in. and about 10 in., and the depth of the carton is between about 1.5 in and about 3.0 in.

CONCLUSION

In view of the foregoing discussion, the Applicants respectfully request reversal of the rejection of the pending claims.

Respectfully submitted,
FITCH, EVEN, TABIN & FLANNERY

By


Joseph E. Shipley
Registration No. 31,137

August 2, 2004

120 South LaSalle Street, Suite 1600
Chicago, Illinois 60603-3406
Telephone (312) 577-7000
Facsimile (312) 577-7007